FILE COPY

FILED
MAY 20 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 933

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, *et al.*,

Petitioners,

vs.

THE EVENING NEWS PUBLISHING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JEROME C. EISENBERG,
Counsel for Petitioners,
744 Broad Street,
Newark 2, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

TABLE OF CONTENTS.

	PAGE
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
The Court of Appeals misconstrued and misapplied the decision of this Court in *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1 (1958), (1) by assuming that a group boycott is illegal despite the absence of evidence of economic power of the parties to the controversy, (2) by assuming that the conditions precedent to imposition of a *per se* rule of illegality as to tie-in sales stated in the *Northern Pacific* case apply to group boycotts as well, and (3) by extending the application of the *Northern Pacific* case to an area not justified or intended by that decision	8
CONCLUSION	13
Appendix A—Opinion Below	14
Appendix B—Judgment Below	24
Appendix C—Dealer Delivery Records	26

Table of Authorities.

Cases Cited.

	PAGE
Associated Press v. *United States*, 326 U. S. 1 (1945)	11
Fashion Originator's Guild of America, Inc. v. *Federal Trade Commission*, 114 F. 2d 80 (C. A. 2, 1940); affirmed, 312 U. S. 457 (1941)	10, 11
Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951)	10, 11
Klor's Inc. v. *Broadway-Hale Stores, Inc.*, 27 Law Wk. 4253 (U. S. 1959)	10
Loewe v. *Lawlor*, 208 U. S. 274 (1908)	11
Montague & Co. v. *Lowry*, 193 U. S. 38 (1904)	11
Northern Pacific R. Co. v. *United States*, 356 U. S. 1 (1958)	7, 8, 10, 11, 12, 13
United States v. *Insurance Board of Cleveland*, 144 F. Supp. 684 (N. D. Ohio, 1956)	10

Statutes Cited.

15 U. S. C. § 1, 69 Stat. 282	2, 3, 4, 7, 8
15 U. S. C. § 2	4, 7
28 U. S. C. § 1254(1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No.

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, *et al.*,
Petitioners,

v.

THE EVENING NEWS PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Allied Newspaper Carriers of New Jersey, James L. Hutchings, Alfred Greenhalgh, Robert A. Wrobel, Lazzard L. Chaiken, Earl Mills, Albert Mills, Herman W. Heitman t/a Mercury News Co., Peter DaRoga t/a Montclair News Co., James J. Salmon, Jr., Edwin Van Demark, Howard J. Young, Sam G[illegible]law, Martin Ginsberg, Sidney Rauchbach, Herman Am[illegible]t/a Verona News Co., Joseph Gutkowski, John Tor[illegible]les Topf, Lawrence Kocheireiss t/a Larry's News Service, and Rod Sherer t/a Unionville News,

pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on February 20, 1959, and set out in Appendix B of this petition (*infra*, p. 24).

Citations to Opinions Below.

The opinion of the District Court for the District of New Jersey (R. 612a-632a), is reported in 160 F. Supp. 568. The opinion of the Circuit Court of Appeals, printed as Appendix A hereto, *infra*, p. 14, is reported in 263 F. 2d 715.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 20, 1959. Appendix B, *infra*, p. 24. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented.

Whether a group boycott may constitute a *per se* violation of § 1 of the Sherman Act in the complete absence of record evidence or court findings of the economic power of the boycotting group.*

* Another question in this case is whether stoppage of local distribution of a newspaper constitutes a substantial restraint upon interstate commerce simply because, in the process of publishing, the newspaper uses national newsgathering services, sends its reporters beyond state lines, obtains production materials and advertising from without the state, and distributes a slight percentage (less than 2½%) of its editions out-of-state. Petitioners reserve their right to argue this question before the Court if certiorari is granted, but they do not advance the question as a basis of this petition for certiorari.

Statute Involved.

The statutory provision involved is Section 1 of the Sherman Act, as amended, 69 Stat. 282, 15 U. S. C. § 1, which provides as follows:

> "§ 1. Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy

declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

Statement.

Respondent, Evening News Publishing Company (hereafter termed the "News"), instituted civil antitrust proceedings against petitioners, Allied Newspaper Carriers of New Jersey (hereafter termed "Allied"), and 19 individual home delivery dealers, alleging that petitioners' boycott of newspapers published by the News violated §§ 1 and 2 of the Sherman Act, as amended, 69 Stat. 282, 15 U. S. C. § 1. Temporary and permanent injunctive relief was requested against any further boycotting activity. The jurisdiction of the District Court was invoked because the case arises under the Sherman Act.

The News, a New Jersey profit corporation, publishes the Newark Evening News (a daily afternoon paper), and the Newark Sunday News (published on Sundays only), the daily paper having a circulation of about 290,000 copies and the Sunday paper about 335,000 copies (R. 81a). Their distribution is effected in various ways; newsstand sale, mail subscriptions, home delivery by newsboys, and home delivery by "home delivery dealers" (R. 10a, 84a, 198a). The latter are small, independent businessmen operating either from their homes or from small retail establishments such as confectionery stores, who buy papers from the News and distribute them on routes acquired either by purchase from dealers (R. 547a, 505a) or by customer solicitation (R. 552).

An average home delivery dealer pays the News 31.8 cents** for six daily papers and one Sunday paper (R. 85a), charges the home delivery customer 50-59 cents** for these papers (R 384a-386a, 490a, 499a, 558a, 578a), and serves approximately 630 customers (R. 102a-104a).* Thus a dealer who charged his customer 55 cents per week would receive a gross profit of 23.2 cents per customer, from which he must deduct truck operation and maintenance costs, depreciation and rent, wages (of delivery employees), social security taxes, and unemployment compensation contributions.

Allied is a voluntary association of some of the home delivery dealers, formed into a non-profit New Jersey corporation to act as a bargaining agent in grievances between the dealers and the News (R. 47a-48a). Prior to August, 1956, Allied operated as an unincorporated association. In February, 1956, the association complained to the News that distribution of the papers was being made to the dealers after the newsboys (R. 620a-621a), thereby giving the boys a service advantage to offer prospective subscribers. The dealers claimed they would discontinue handling the News unless late delivery from the News was stopped. The News agreed to improve its service (R. 621a).

In July, 1956, the News rejected demands by the dealers for removal of newsboys who were making home deliveries

** These figures reflect the prices in effect during the trial below. On the day following entry of the Final Judgment, the News increased the price of its daily paper from 5 cents to 7 cents per copy. The price charged the home delivery dealers by the News was likewise increased.

* The average total number of customers is estimated from testimony concerning the amount of papers normally purchased by 46 home delivery dealers who refused to accept papers on May 20, 1957, the first day of the trial below.

in the same geographical area as that of the dealers,* and on July 14, a total of 16 members of Allied refused to accept any further deliveries from the News (R. 621a-622a). This refusal, which failed and ended after two weeks, affected about 15,000 daily papers (about 5% of total daily circulation) and a somewhat lesser amount on Sunday (about 4% of total Sunday circulation) (R. 622a-623a).

A month later the 19 home delivery dealers who are the individual petitioners in this case incorporated Allied. Negotiations with the News for the removal of substitute newsboys added during the July, 1956, boycott — many of whom had taken over substantial portions of the dealers' routes (R. 407a, 481a, 482a) — continued into January, 1957. At that point, a second boycott was proposed, and the News instituted the present proceedings (R. 623a).

On May 20, 1957, three days before the trial of this action began, 46 members of Allied** again refused to handle newspapers from the News, affecting about 32,000 daily and Sunday papers (about 11% of the daily distribution and 10% of the Sunday distribution). However, by resort to other means of service, the News succeeded in delivering 16,000 papers daily to the readers affected by this second boycott, thereby reducing the total decrease in home de-

---

* These demands originated from the dealers' fear that the News was attempting to replace them with newsboys, thereby destroying the substantial capital value of their routes (R. 208a, 393a-395a, 479a-481a, 495a-497a, 565a-568a). Among other points of dispute, News' subscription drives advertising weekly rates of 50 cents per week (the usual newsboy price) added to the fear of the dealers. While the District Court found that the News was not in fact conducting any systematic exclusion tactics (R. 627a), that does not eliminate the fear of the dealers, although it may indicate a lack of basis for that fear, in the judgment of one not affected by it.

** All 46 dealers did business in New Jersey. Not one of them or any other member of Allied delivers papers outside of the State of New Jersey (R. 102a, 103a).

livery distribution to about 5% of the normal amount. This boycott lasted about one month before it, too, ended in failure for the dealers when the District Court entered an interlocutory injunction on June 18, 1957 (Appendix A, *infra*, p. 17).

After the trial below and prior to decision thereof, the District Court Judge died and another was assigned, who, after written and oral argument by counsel, held that Allied had violated § 1 but not § 2 of the Sherman Act (Appendix A, *infra*, p. 18). This District Court found a substantial restraint of commerce in the relevant market (defined as being home delivery distribution of the News) (R. 626a), apparently basing that decision upon the fact that 16,000 papers were affected by the first boycott and 32,000 papers by the second boycott. While the District Court held that Allied did not possess requisite economic power for a violation of § 2 of the Act (R. 631a-632a; Appendix A, *infra*, p. 18), it found a violation of § 1 simply because "[c]ombination boycotts, like other group action to coerce, have long been condemned as unreasonable restraints under § 1 of the Sherman Act" (R. 628a), and entered permanent injunction. Upon appeal by petitioners, the Court of Appeals affirmed, holding that the decision of this Court in *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1 (1958), handed down in the interim period between the District Court decision and the Court of Appeals argument, made group boycotts illegal *per se* under the circumstances of this case.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals in the instant case misconstrues and misapplies the decision of this Court in *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1 (1958). Recognizing that the *Northern Pacific* case established conditions precedent to invocation of the rule of *per se* illegality under § 1 of the Sherman Act, the Court of Appeals in the instant case held that these conditions were met by showing (1) a substantial restraint of trade in the relevant market, (2) affecting an appreciable amount of commerce (Appendix A, *infra*, p. 22). But the test in *Northern Pacific* requires (1) "*sufficient economic power* • • • to appreciably restrain free competition in the [relevant] market", (2) affecting a "not insubstantial amount of commerce". 356 U. S. 1, at 6. (Emphasis supplied)*

The first of the conditions laid down in *Northern Pacific* refers to economic power to produce an appreciable restraint, and not simply whether an appreciable restraint has in fact occurred. Ordinarily, of course, restraint does not exist in fact unless power to restrain also exists.** Nevertheless, it is extremely important that the procedure set out in *Northern Pacific* be followed exactly, in order that application of the Sherman Act be avoided in just such cir-

* This assumes that the test stated in *Northern Pacific* for tie-in sales applies by analogy to group boycotts. It could hardly apply directly, notwithstanding the view of the Court of Appeals, because it was expressed in a tie-in sale case, in language peculiar to such sales. 356 U. S. 1, at 6.

** That may not always be true. A group boycott might produce an appreciable restraint, in the absence of any real power to restrain, simply because the persons affected refrain, for reasons of their own, from employing available counter-steps.

cumstances as those of the present case where small businessmen—economic midgets—combined to gain some semblance of parity with an economic giant upon which their very livelihood depends, and to which their livelihood is financially *de minimis*.

Had either court below in the instant case referred directly to the economic power of Allied, the inconclusive nature of the fact that 15,000 home delivery copies were affected by the first boycott and 32,000 copies by the second boycott would have been immediately apparent. The 32,000 copies controlled by the dealers in question represents but 15% of the daily *home delivery* market, not of the entire circulation.* Moreover, that figure must be diluted by the ability of the News to fill the vacancy (or any vacancy, for that matter) caused in the home delivery market with additional newsboys** and its own delivery trucks. In 1957, the News provided substituted home delivery for 16,000 of the 32,000 copies affected by the second boycott, reducing the total number of copies affected by that boycott to 7½% of the home delivery market. The significance of the dealers' ability to affect 32,000 home delivery copies is further decreased by the dependence of the dealers upon the News for the bulk of their business. Newspapers purchased from the News represented well over 90% of the afternoon business of the dealers called to the stand by the News during trial; and one-third of those dealers had no morning delivery business (Appendix C, *infra*, pp. 26, 27). No record evidence appears that either customers or subscribers were

---

* Home delivery dealers distribute about 67,000 daily papers throughout New Jersey (R. 31a, 85a), and it may be inferred that newsboys deliver approximately 140,000 daily copies to subscribers' homes (R. 31a, 115a) totaling 207,000 home delivery daily copies.

** The evidence disclosed that, during the 7 years preceding the trial below, the number of respondent-owned "newsboy routes" increased from 800 to 2,500 (R. 115a).

lost to the News, and repeated conversations in the record illustrate a thoroughly contemptuous attitude by the News toward the purported "pressures" of the first and second boycotts (R. 268a, 396a). Judge Modarelli of the District Court summed up the economic weakness of the dealers when, in granting the News' motion for temporary injunctive relief, he observed, "Of course, the defendants are going to suffer irreparable injury, too." (R601a).

2. An even more basic misapplication of *Northern Pacific* may lie in the tacit assumption of the Court of Appeals that the same conditions precedent to imposition of a *per se* rule of illegality apply to group boycotts as to tie-in sales, or at least that a proper analogy may be made to the one from the other. It is clear that not all group boycotts are illegal *per se*, *United States* v. *Insurance Bd. of Cleveland*, 144 F. Supp. 684 (N. D. Ohio 1956), and that certain conditions must be met before applying the *per se* rule, *Fashion Originator's Guild of America, Inc.* v. *Federal Trade Commission*, 114 F. 2d 80, 84 (C. A. 2, 1940), affirmed without comment on this point, 312 U. S. 457 (1941). But whereas the power condition referred to in *Northern Pacific* is simply power to produce an effect on a relevant market, a more sweeping sort of power has been apparent in each group boycott case before the United States Supreme Court; namely, broad economic and financial strength effectively to oppose the boycotted party or to maintain efficient control of the various elements of the boycotting group. See *e. g.*, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 27 Law Wk. 4253 (U. S. 1959) (boycotting group included General Electric, Emerson, RCA, Zenith and Admiral, opposing a single retailer); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*,

Inc., 340 U. S. 211 (1951) (boycotters were Seagram and Calvert, opposing certain wholesalers); *Associated Press* v. *United States*, 326 U. S. 1 (1945) (boycott by all members of AP, "the chief single source of news for the American press," 326 U. S. at 11, against certain newspapers); *Fashion Originator's Guild of America, Inc.* v. *Federal Trade Commission*, 312 U. S. 457 (1941) (boycotting group controlled nearly 40% of all dresses wholesaling at $6.75-$10.75 in this country, and 60% of all higher priced dresses); *Loewe* v. *Lawlor*, 208 U. S. 274 (1908), (boycotters were described as "members of a vast combination," a national hatters union); *Montague & Co.* v. *Lowry*, 193 U. S. 38 (1904), (boycotting group included all tile manufacturers with whom the boycotted party ordinarily dealt).

All these cases presuppose the finding that economic power in the boycotting group in this sweeping sense is prerequisite to finding a group boycott illegal *per se*, certainly a reasonable condition when one considers the gravity of applying a *per se* rule of illegality. Moreover, this broader condition precedent as to group boycotts is perfectly consistent with the less extensive showing required as to tie-in sales: the very existence of the tie-in sales suggest broad economic superiority in and of itself, since the sale cannot be consummated until the buyer has "knuckled under" by curtailing his freedom in the market of the tied product in order to gain access to the tying product. The mere existence of group boycotts, however, is no indication whatsoever of superior or even substantial economic power in the boycotting group. Nor can any fair inference of substantial economic power be drawn from the initiation or existence of a boycott by a group. Nor is the maintenance of such

boycotts any indication in and of itself of coercion of individual members of the group by the whole group: unity of action in a group devoid of any vestige of collective sanction against individual members—and that is the position of Allied*—may well indicate nothing more than continued voluntary desire in each member to pursue the collective goal.

Except where overwhelming economic power in the boycotters is obvious, this broader power concept certainly presupposes a comparison of the economic strength of the two antagonistic parties, and of the strength of the group as against any individual member thereof. In the instant case, however, the News introduced no evidence to show the strength of Allied, and, indeed, significantly failed even to reveal its own financial and economic position.

3. Clearly the question presented is of great importance in proper administration of the antitrust laws. As modern business complexities make use of the Rule of Reason more difficult, should the *per se* area of illegality under the Sherman Act be relied upon even to the detriment of small business? The *Northern Pacific* case was a step toward clarification, but its effectiveness is greatly endangered by the decision below in the instant case. If the standards laid down in *Northern Pacific* were intended to cut across the entire area of *per se* illegality, then that principle should be brought out in the present case, lest confusion be compounded rather than dissolved.

---

* Note that, unlike many boycotting groups, the individual members of Allied do not deal or trade with each other. Accordingly, any individual member may incur the disfavor of the group with economic impunity. Nor is there any security fund or other deposit required or made upon joining the group which would be forfeited upon ouster therefrom.

Moreover, the present case represents a significant breach in traditional usage of *per se* rules in the area of group boycotts, threatening automatic application of the Sherman Act to the most modest enterprise, and stripping from small business its only rallying point of survival—unity—against the powerful encroachment or dictation of mammoth enterprises. It assuredly will lead to other and numerous Sherman Act proceedings against small business combinations, each of which must face the basic problem again; namely, whether *Northern Pacific* was intended to have such a result.

It is respectfully submitted that the dogmatic application of the *Northern Pacific* case by the Court of Appeals to this case has supplied the powerful arm of the judiciary in aid of a large corporation having a virtual monopoly and tremendous resources, to smother the feeble attempts of the individual petitioners, a small group of entrepreneurs, who had joined together to attempt to make their feeble protests effective. Their attempts could not possibly suppress or destroy competition, nor did the record below show that the individual petitioners had sufficient economic strength even to affect competition adversely.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME C. EISENBERG,
Counsel for Petitioners.

Dated: May 18, 1959.

APPENDIX "A".

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,647

THE EVENING NEWS PUBLISHING COMPANY, A CORPORATION,

Plaintiff-Appellee,

v.

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, A CORPORATION, ET AL.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued November 20, 1958

Before BIGGS, *Chief Judge*, and MARIS and MCLAUGHLIN, *Circuit Judges.*

Opinion of the Court.

(Filed February 20, 1959)

By MCLAUGHLIN, *Circuit Judge.*

This anti-trust litigation arises from defendants' efforts to force plaintiff to eliminate newsboy home delivery of plaintiff's newspapers, The Newark, New Jersey Evening and Sunday News.

Appendix "A"—Opinion of the Court.

The defendants consist of 19 home delivery dealers and a New Jersey non-profit corporation, Allied Newspaper Carriers of New Jersey, formed by the individual defendants in August, 1956. The corporation acted as bargaining agent for its members. By June, 1957 its membership had increased to 133 home delivery dealers.

The facts found by the district court were mostly conceded, though there seems some misunderstanding as to this by appellants' present counsel. In any event there is substantial support in the record for the court's fact findings which are set out in great detail in the opinion below, F.Supp. (1958). Only those necessary for present purposes will be noted.

Allied on February 15, 1956, was an unincorporated association of Home Delivery Dealers of which James L. Hutchings was president. On that date he, with 17 other members, complained to the News Circulation Director about late deliveries of the paper to the dealers. They threatened to discontinue handling the News unless this was remedied. Plaintiff agreed to improve its service. After that and prior to July 13, 1956, Hutchings demanded of the Circulation Director that all newsboys delivering the News in any territory of the Dealers should be forced out of business by plaintiff refusing to sell its newspapers to them. Plaintiff refused and was again threatened by the Dealers' spokesman with a refusal to handle the News by the Dealers. Within the same period, the Dealer representative demanded that plaintiff "shut out" any distributor other than the newspaper man or Dealer in the particular area allocated to him by the Dealers themselves. On July 13, 1956, Hutchings and an attorney, who later represented the defendants at the trial, gave the News Circulation Director the ultimatum that unless plaintiff discontinued the use of newsboys in the distribution of its

newspaper, the Dealers would no longer handle it. This was refused and that same day the Dealers refused to accept copies of the News from plaintiff. The latter tried to fill the gap with substitute carriers, selling its papers to them on the same terms as had existed between plaintiff and its other newsboys and the Dealers.

The number of newspapers affected daily was about 15,000; on Sunday the amount was somewhat less. The Dealers' action continued for about two weeks with 16 of the individual defendants participating. Just prior to its start, the Dealers gave written notices to their customers accusing the News of unethical practices, explaining that they would be unable to deliver the paper temporarily and suggesting that the Dealer be notified if the customer wished to substitute another paper. Certain of the Dealers gave their customers a notice which accused the News of trying to eliminate them and confectionery stores from the newspaper business and thus control circulation, etc. This notice warned that plaintiff would tempt little children into becoming newsboys by giving them the idea they would become little merchants handling their own routes. Some of the notices conveyed the idea that children acting as newsboys were forced to make their deliveries in bad weather and when they were ill. Other notices charged that the low rates insisted on by the News made it impossible for the Dealer to earn a living. Another form of notice said plaintiff sought men's services at boys' wages.

At the expiration of the two weeks the Dealers resumed taking and distributing the News but sought to persuade plaintiff to induce the substitute newsboys in the Dealers areas to withdraw. Business relations continued between the Dealers and the News until January, 1957, when at a meeting between Hutchings with some other Dealers and News Circulation Department personnel, demand was made

that the substitute boys be eliminated. This was refused and Hutchings for the Dealers renewed the strike threat. As a result plaintiff brought this suit charging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and seeking interlocutory and permanent injunctive relief.

An answer was filed admitting the jurisdiction of the court and all of the allegations of the complaint regarding the intrastate and interstate elements of plaintiff's business. It denied plaintiff was entitled to relief and alleged various affirmative defenses.

On or about May 20, 1957, the date originally fixed for trial of this matter, the Allied members renewed their boycott of the News. This was stopped on June 18, 1957, solely by the interlocutory injunction. During the boycott period, the Dealers refused to handle approximately 32,000 daily and Sunday copies of the papers. By expensive substitute service, the News succeeded in having approximately 16,000 papers delivered to the readers affected.

The trial of the suit started May 23, 1957 and continued intermittently until June 17, 1957. On June 18, 1957 an interlocutory injunction was allowed plaintiff. Prior to final decision the district judge who heard the matter, died and the case was reassigned. Thereafter briefs were filed and oral arguments had. At that time counsel for the defendants adopted the factual summary set out in plaintiff's main brief and withdrew the affirmative defenses of the answer. He, for the defense, continued to assert that no relief was justified under the circumstances and questioned the sufficiency of the complaint. It was conceded on behalf of the defendants that their actions complained of resulted from an agreement and combination of the individual defendants through their membership in the corporate defendant.

The district court held that there had been a restraint of trade in violation of Section 1 of the Sherman Act but that the evidence failed to sustain the charged violations of Section 2 as to monopolizing. The injunction was made permanent and the final decree was entered April 9, 1958.

Appellants on this appeal assert that the proofs fail to show a conspiracy to restrain interstate commerce. They stress that such was not their intention; they make no attempt to divide plaintiff's business into intrastate and interstate but seek to emphasize that it was not shown that any Allied member delivers outside of New Jersey; they would excuse their action as protection against discriminatory practices and unfair competition, saying that "The 'restraint' was not intended to achieve a restraint upon interstate commerce."

The truncated argument advanced would have us forget completely that interstate commerce is an inseparable, indispensable part of this plaintiff newspaper. The News does furnish neighborhood, city, county and state news to its readers. And by far the major portion of its sales are in New Jersey. But an essential element of its being, (perhaps considering its territory and the present state of this world of ours its most essential element) is the obtaining, dissemination and interpretation of national and world-wide news. Intrastate advertising is necessary to the economic life of the paper and necessary to its readers. Interstate advertising affects the paper and its readers to a lesser degree but affect them it does appreciably. To place that news and advertising in the hands of New Jersey people requires, as the United States Supreme Court said in Lorain Journal v. United States of America, 342 U.S. 143, 151 (1951), "• • • continuous interstate transmission of materials and payments to say nothing of the interstate commerce involved in the sale and delivery of products

sold." The end result, the distribution of the News, as a complete newspaper containing those news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in Lorain (p. 152), "• • • an inseparable part of the flow of the interstate commerce involved." That Court said further (p. 152), "Without the protection of competition at the *outlets* of the flow of interstate commerce, the protection of its earlier stages is of little worth." (Emphasis supplied.) It should be noted that in Lorain, as here, the contention was that merely a local issue was in dispute. See also Greenspun v. McCarren, 105 F.Supp. 662 (D.C. Nev. 1952); Hearst Publications v. N.L.R.B., 136 F.2d. 608, 610 (9 Cir. 1943), rev. other grounds, N.L.R.B. v. Hearst Publications, 322 U.S. 11 (1944). See generally Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 602-603, 604-605, 610 (1953).

Whatever may have been its purpose, plainly the restraint imposed by defendants did affect interstate commerce. But, suggest the appellants, plaintiff must go further than that, it must prove that the activities of the defendants directly affected interstate commerce and that there has been undue restriction thereon harmful to the general public. Again they stress what they call "the purely local activities of these defendants."[1]

The district court concluded from the evidence that the restraint on interstate commerce was undue and substantial. Our examination reveals that the record supports these findings. The Lorain opinion governs the situation before us. United States v. Yellow Cab Co., et al., 332 U.S. 218 (1947) is hardly in point but, as far as it goes, supports

[1] They urge, as they did below, that it is the plaintiff who is really fixing the prices of the home delivery of its papers. The district judge found no support in the evidence for that assertion; to the contrary ample basis for its negation. The record entitled him to those conclusions and we have no right to disturb them.

the proposition that the home delivery of the News is an integral part of the interstate operation. The other two early decisions relied on do not represent what we think is the present law.[2]

Finally, appellants assert that their concerted refusal to accept the News for home delivery did not restrain competition. They "maintain" their concession that their actions and refusal to deal with plaintiff which resulted from an agreement among themselves went no further than to relieve plaintiff of the burden of showing that a "combination" existed; that it did not relieve plaintiff of proving that the combination was one which unreasonably restrained competition.

The Supreme Court in Northern Pacific R. Co. v. United States, 356 U.S. 1 (March 10, 1958) left no doubt what the true rule is in a group boycott case like the one before us. Mr. Justice Black for the Court said at page 5:

> "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has

[2] Anderson v. United States, 171 U.S. 604 (1898); Hopkins v. United States, 171 U.S. 578 (1898).

been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210; division of markets, United States v. Addyston Pipe & Steel Co., 85 F. 271, aff'd, 175 U. S. 211; *group boycotts*, Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457; and tying arrangements, International Salt Co. v. United States, 332 U. S. 392." (Emphasis supplied).

The Northern Pacific litigation dealt with tying arrangements, one of the same category as group boycotts. Justice Black, speaking of these said at page 6:

"Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' Times-Picayune Publishing Co. v. United States, 354 U.S. 594, 606. *They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial amount of interstate commerce is affected.*" (Emphasis supplied).

There was no incredibly complicated and prolonged economic investigation in this suit such as the Supreme Court, in Northern Pacific, holds unnecessary in a group boycott. Nevertheless the district court did sit for at least eleven days hearing testimony and argument. From the record it was held that the evidence established that the restraint resulting from the Dealers refusal to handle deliveries of the News for the home delivery market had made itself felt to a substantial degree. This was based on the uncontradicted testimony that the 1956 boycott had stopped the home delivery of about 15,000 daily papers and a somewhat lesser number on Sunday; that the restraint was enhanced by the written notices the Dealers circulated among their customers; that the 1957 boycott had prevented delivery of some 32,000 papers, daily and Sunday; that the plaintiff's extraordinary costly effort to keep its home delivery readers supplied in the latter crisis only took care of about half of those cut off by the strike.

Appellee claims that the 1957 boycott affected 20% of the total circulation of the News. This is disputed by the Dealers, as complicated mathematics. Even if the percentage figure were to be considerably reduced the number of papers eliminated by the boycotts is before us. These constituted "an appreciable amount of commerce under any standard". United States v. Yellow Cab, 332 U.S. 218, 225-226 (1947).

It seems to us therefore from the record, that it was solidly established in the course of the trial that the boycotts had appreciably restrained free competition in the home delivery of the newspapers involved and that a not insubstantial amount of interstate commerce was affected. The evidence also unquestionably demonstrates the effort of the defendants to acquire a monopoly of plaintiff's home delivery business, though we agree with the district court

that it fails to establish that defendants possessed the power to actually accomplish this particular objective. Appellee strongly contends that the presence of intent to suppress competition removes the obligation of proving that a substantial amount of interstate commerce is affected. Because, as we have already stated, the record firmly supports the Supreme Court test as laid down in Northern Pacific, there is no need for us to pass upon that question at this time.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "B".

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,647

THE EVENING NEWS PUBLISHING COMPANY, a corporation of the State of New Jersey

vs.

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, a corporation of the State of New Jersey, et al.

James L. Hutchings, Alfred Greenhalgh, Robert A. Wrobel, Lazzard L. Chaiken, Earl Mills, Albert Mills, Herman W. Heitman, t/a Mercury News Co., Peter DeRoja, t/a Montclair News Co., James J. Salmon, Jr., Edwin VanDemark, Howard J. Young, Sam Ganslaw, Martin Ginsberg, Sidney Rauchbach, Herman Amsterdam, t/a Verona News Co., Joseph Gutkowski, John Torley, Charles Topf, Lawrence Kachelriess, t/a Larry's News Service, Rod Sherer, t/a Unionville News, and Allied Newspaper Carriers of New Jersey, a corporation,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, *Chief Judge* and MARIS and MCLAUGHLIN, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk.

February 20, 1959.

APPENDIX "C".

Summary of the Testimony of the 33 Home Delivery Dealers called by Plaintiff on May 23 and May 24, 1957

(Transcript pages 20 to 206)

Dealer	Number of Copies of Newark Evening News Delivered Daily	Approximate Percentage of Newark Evening News Delivered to Total Deliveries of Afternoon Papers	Morning Delivery Business
Greenhalgh	2,010		Yes
Kachelriess	1,575	75%	Yes
Sherrer	1,155	90%	Yes
Albert & Earl Mills	1,450	65%	Yes
Van Demark	650	85%	No
Hutchings	825	99%	Yes
Ginsberg	801	95%	Yes
Chaiken	620	90–93%	No
Amsterdam	990	95–97%	Yes
Salmon	825	99%	No
Heitmann	475	90%	Yes
Torley	650	80%	Yes
De Roja	260	88%	Yes
Ganslaw	380	95%	Yes
Gutkowski	790	99%	Yes
Rauchbach	525	99%	No
Topf	560	97%	No
Young	375	94%	No

Appendix "C" — Home Delivery Dealers.

Dealer	Number of Copies of Newark Evening News Delivered Daily	Approximate Percentage of Newark Evening News Delivered to Total Deliveries of Afternoon Papers	Morning Delivery Business
McGuire	659	97%	Yes
Haug	1,075	95%	Yes
Kraut	360	62%	No
Shara	1,075	94%	Yes
Henrich	565	95%	Yes
Sambrat	560	99%	Yes
Youschak	775	96%	Yes
Sheldon	655	95%	Yes
Irving Rothman	750	90%	No
Harry Rothman	860	90%	No
Selecky	627	90%	No
Piserchio			
Parkway Apts.	388	96%	Yes
Others	550	94%	No
Gottesman	750	96%	Yes
Simpson	535	50%	Yes
Wrobel	650	93%	Yes